EXHIBIT 4

1 of 1 DOCUMENT

Standardized Civil Jury Instructions for the District of Columbia

CHAPTER 11 CONTRACTS

1-11 Civil Jury Instructions for DC § 11.15

§ 11.15 CONTRACT INTERPRETATION--CUSTOM AND USAGE

[1] Instruction 11-15

Contract Interpretation: Custom and Usage (D.C. Std. Civ. Jury Instr. No. 11-15)

There is a dispute in this case about the meaning of the words in the contract. You must determine whether the parties intended the words to have their ordinary and plain meaning, or whether they intended the words to have a special meaning in accordance with the customs or usages of a particular trade or business. You may consider how persons use the words in [the particular trade or business] to help decide what the parties to this contract understood the words to mean.

Legislative Precedents and Commentary

Predecessor: (None.)

Statutes: D.C. Code § 28:1-205.

Cases: *R. A. Weaver & Assocs. v. Asphalt Constr. Inc., 587 F.2d 1315, 1320-1321, 190 U.S. App. D.C. 418 (1978)* ; *Maurice Elec. Supply Co. v. Anderson Safeway Guard, 632 F. Supp. 1082, 1087-1088 (D.D.C. 1986)* ; *Howard Univ. v. Best, 547 A.2d 144, 151 (D.C. 1988)* ; *Intercounty Constr. Corp. v. District of Columbia, 443 A.2d 29, 32-33 (D.C. 1982)* ; *1901 Wyoming Ave. Coop. Assoc. v. Lee, 345 A.2d 456, 461-462 (D.C. 1975)* ; *Edmonson v. Mosley, 259 A.2d 110, 111 (D.C. 1969)* ; *Weaver v. Du Pont, 119 A.2d 716 (D.C. 1956)* ; *Lucas v. Auto City Parking Co., 62 A.2d 557, 559 (D.C. 1948)* ; *McDevitt v. Waple & James, Inc., 34 A.2d 39, 40 (D.C. 1943)* .

[2] Comment

This Instruction states D.C. law supported by the cited cases. The item in brackets allows the court to tailor this instruction to the particular trade or industry involved in the case.

Words are to be given their generally prevailing meaning [Restatement (Second) of Contracts § 202(3) (a) (1981)]. Words in a contract are given their ordinary, plain or natural meaning unless there is reason to give them another or technical meaning [17A Am. Jur. 2d *Contracts* § 356 (2004)]. Technical terms and words of art are given their technical meaning when used in a transaction in their technical field [Restatement (Second) of Contracts § 202(3) (b) (1981); 17A Am. Jur. 2d *Contracts* § 360 (2004)]. It is proper to consider the meaning the parties have given the contract terms in their prior dealings, as well as the meanings from business, custom or trade usage [17A Am. Jur. 2d *Contracts* § 361 (2004)].

This Instruction presents the jury with the question of whether the terms of the contract should have plain and ordinary meanings or special meanings based on the transaction's context. The general rule of interpretation is to ascertain what a reasonable person in the parties' position would have thought the terms meant [*1901 Wyoming Ave. Coop. Assoc. v. Lee, 345 A.2d 456, 461-462 (D.C. 1975)]* . Where the terms do have a special meaning, the jury can look to the course of performance and then usage of trade [*see* 17A Am. Jur. 2d *Contracts* § 361 (2004); Restatement (Second) of Contracts § 203(b) (1981) (favoring express terms over course of dealing, and course of dealing over usage of trade); D.C. Code § 28:1-205 (express terms and course of dealing and usage of trade to be construed as consistent where reasonable; but if unreasonable, follows Restatement rule above)].

There is a problem with overlapping meanings of the words "custom" and "usage." A "custom" is a "usage or practice" which by long history of repetition and acceptance has acquired the force of law [*Black's Law Dictionary* 202 (5th ed. abridged 1983); 21A Am. Jur. 2d *Custom & Usage* § 1 pp. 699-700 (1998)]. A "usage" is a "reasonable and lawful public custom in a locality concerning particular transactions," which is so well known that the parties to such a transaction are presumed to have acted with reference to it [*Black's Law Dictionary* at 801; 21A Am. Jur. 2d *Custom & Usage* § 1 pp. 699-700 (1998); Restatement (Second) of Contracts § 219 (1981)]. A "usage of trade" is the "mode of dealing generally observed in a particular trade." A custom is a usage raised to the force of law [*Black's Law Dictionary* at 801; *McDevitt v. Waple & James, Inc., 34 A.2d 39, 40 (D.C. 1943)]* .

Thus in this legal context the terms "custom" and "usage" refer to modes of dealing, i.e. activities of persons. The term "usage," however, also refers to word meanings, i.e. the way a particular word or phrase is often or commonly used to express a particular idea [*Webster's New Universal Unabridged Dictionary* 2012 (2d ed. 1983)]. It is facially ambiguous, therefore, to say that the "court should interpret a term with reference to the usage of trade." Does the term "usage" mean activity or word meaning?

The meanings of these terms are important for this Instruction because an earlier proposed Instruction would have required "clear and satisfactory" proof of the "customs" or "usages" in the trade context. D.C. decisions impose this burden of proof in cases where the "custom," if proved, will attain the force of law [*see Lucas v. Auto City Parking Co., 62 A.2d 557, 559 (D.C. 1948)* (need to prove custom and usage to establish an implied bailment contract); *McDevitt v. Waple & James, Inc., 34 A.2d 39, 40 (D.C. 1943)* (alleged custom not established thus lacked force of law)].

Where a contract's language is ambiguous, the courts may consider "the special meaning which trade custom or usage attaches to certain words or terms" [*Della Ratta, Inc. v. American Better Community Developers, Inc., 380 A.2d 627, 635 (Md. App. 1977)]* . Evidence of custom and usage may explain what is ambiguous in contract language, but cannot vary or contradict plain terms [21A Am. Jur. 2d *Custom & Usage* §§ 25-28]. The evidence of custom is admitted to aid the interpretation of words having a special or technical meaning [*Walker v. Gateway Milling Co., 92 S.E. 826 (Va. 1917)* ; *accord, Della Ratta, Inc. v. American Better Community Developers, Inc., 380 A.2d 627, 635 (Md. App. 1977)* (custom evidence can establish how a term is used in the particular trade)]. Custom and usage may be shown to establish a point on which the contract is silent or unclear [*Virginia Model Jury Instructions--Civil Instruction No. 45.340* (Michie 1993)].

The trade custom or usage itself, i.e. the commonly accepted mode of dealing, requires proof by clear and satisfactory evidence, to attain force of law [*Weaver v. Du Pont, 119 A.2d 716, 717 A.2d 785 (D.C. 1956)* ; *McDevitt v. Waple & James, Inc., 34 A.2d 39, 40 (D.C. 1943)]* . Whether the *meaning* of the terms, however, requires the same degree of proof, is uncertain. In *Edmonson v. Mosley, 259 A.2d 110, 111 (D.C. 1969)* , the court interpreted language by reference to "the custom of trade," without any reference to the degree of proof of the meaning of the term. In *District of Columbia v. Langenfelder & Son, 558 A.2d 1155, 1159 (D.C. 1989)* , the court determined the "common usage of a particular contract provision" by looking at "administrative and judicial interpretations of the contract provision at the time when the contract was executed." *Langenfelder* referred to "usage" in the sense of word meaning. The Court thus analyzed the *meaning* of the terms, not the "custom" or "usage" of the trade, and made no reference to a party's

heightened burden of proof.

Further complicating matters is the language in some D.C. cases holding that the parties to a contract are presumed to be reasonable persons bound to the "usages" of which they knew or had reason to know at the time of the contract [*Intercounty Constr. Corp. v. District of Columbia, 443 A.2d 29, 32-33 (D.C. 1982)* (party bound to usages he knows or has reason to know); *1901 Wyoming Ave. Coop. Assoc. v. Lee, 345 A.2d 456, 461-462 (D.C. 1975)* (same)]. These cases employ the term "usages" seemingly in the sense of modes of dealing, rather than the meanings of terms. The use of "usages" leaves ambiguity, because contract interpretation in these cases involves both conduct and word meanings.